(24) (25)

Nos. 98-1701 & 98-1706

FILED
NOV 19 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

-and-

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of *Amici Curiae* Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Organized Fisherman of Florida, Inc., Maine Lobstermen's Association, Massachusetts Lobstermen's Association, Cape Cod Commercial Hook Fishermen's Association and Washington Trollers Association in Support of Respondents

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Appendix — Pacific Coast Federation Of Fisherman's Associations Members 1a

INTERESTS OF THE AMICUS CURIAE

The parties' consent to the filing of this brief was lodged with the Clerk of this Court in accordance with Supreme Court Rule 37.[1]

Founded in 1976, the Pacific Coast Federation of Fishermen's Associations ("PCFFA") is the largest trade association of working commercial family fishermen and women on the west coast of the United States. PCFFA is a nonprofit federation and trade association consisting of twenty-five different port associations, fishermen's marketing associations and commercial fishing vessel owner's associations spanning the Pacific coast from San Diego to Alaska with a combined membership of about 2,500 commercial fishing vessels.[2]

The Institute for Fisheries Resources ("IFR"), founded in 1992, is a nonprofit organization dedicated to the protection and restoration of marine and anadromous fish resources throughout the west coast. IFR is closely affiliated with PCFFA and manages PCFFA's fishery conservation and restoration programs.

The Organized Fisherman of Florida, Inc., is Florida's largest organization of small boat commercial fishermen. Its members participate in many small boat fisheries in the U.S. Gulf states region and help provide jobs and high quality seafood to coastal communities in their area.

Maine Lobstermen's Association is the largest fishermen's trade association on the east coast, with more than 1,200

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1. In accordance with Supreme Court Rule 37.6, *Amici Curiae* certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than *Amici Curiae*, has made a monetary contribution specifically for the preparation or submission of this brief.

2. A complete list of PCFFA members is included at Appendix 1.

members supplying fresh lobsters to much of the eastern seaboard and for export.

Massachusetts Lobstermen's Association is the second largest fishermen's trade association on the east coast, with more than 1,000 commercial fishermen members from Maine to New York.

The Cape Cod Commercial Hook Fishermen's Association ("CCCHFA") is a grassroots organization comprised of commercial fishermen and other concerned coastal residents whose rich cultural heritage and traditional economies depend on the productivity and health of the marine ecosystems around them. The CCCHFA has over 500 members, of whom 260 are commercial fishermen and 240 are supporting coastal residents and businesses.

The Washington Trollers Association is the largest organization of commercial troll fishermen in the State of Washington, and represents commercial troll fishermen in all matters related to fisheries regulation, management, legislation, environmental concerns and enforcement.

Collectively, the above organizations appear here as a voice for the thousands of working class families, individuals and professionals who derive their incomes largely from harvesting the natural resources of the sea.

INTRODUCTION & SUMMARY OF ARGUMENT

Throughout the latter half of this century, pollution has emerged as the single greatest threat to the nation's marine resources and fisheries. From oil spills to nutrient loading, environmental threats to the once bountiful ocean and coastal fisheries have pushed many coastal fisheries near to biological collapse. Nearshore waters and coastal estuaries provide essential nursery areas for species that contribute about 75% of all U.S. commercial fish and shellfish landings, and 81-89% of

all recreational catches outside Alaska and Hawaii.[3] Coastal-dependent fish and shellfish harvests contribute roughly $46 billion annually to the U.S. economy, supply more than 600,000 jobs, and provide one of the nation's healthiest food sources.[4] Even so, relatively recent harms to coastal waters and dependent marine life attributable to pollution still cost the commercial fishing industry and the U.S economy an estimated $27 billion annually, enough to support an additional 450,000 family wage earning jobs.[5]

The nation's irreplaceable coastal marine resources are fragile, and the need for their protection from oil pollution and other causes of habitat loss has long been the shared policy of both coastal states and the federal government.[6] Historically, states have enacted many laws to protect coastal fisheries and the natural resources upon which local commercial, Native American, and subsistence fishermen's livelihoods depend. In

3. *See* U.S. Department of Commerce (NOAA), National Marine Fisheries Service, Current Fishery Statistics No. 9205, *Marine Recreational Fishery Statistics Survey, Pacific Coast, 1987-1989*, and Current Fishery Statistics No. 9204, *Marine Recreational Fishery Statistics Survey, Atlantic and Gulf Coasts, 1990-1991*.

4. *See* J.R. Chambers, *Coastal Degradation and Fish Population Losses in* Symposium on Coastal Fish Habitat Conservation, Baltimore, MD (R.H. Stroud ed., 1991) (published by the National Coalition for Marine Conservation); Institute for Fisheries Resources, East Coast Fisheries Foundation and Pacific Coast Federation of Fishermen's Assoc., *Marine Fishery Habitat Protection: A Report to the Unisted States Congress and the Secretary of Commerce* (March 1994).

5. *See id.*

6. For an example of the federal government's recognition of the importance of fishery habitat protection, see Office of the Inspector General, U.S. Department of Commerce, Final Report, IRM-5442, *Program Evaluation, Major Initiatives Needed to Protect Marine Habitats* (January 1994). *See also* Magnuson-Stevens Sustainable Fisheries Act (16 U.S.C. §§ 1801(a)(9) and (b)(7)).

particular, the state of Washington has actively sought to protect the health and welfare of its fisheries and coastal communities through the passage of its Shoreline Management Act, creation of the Puget Sound Water Quality Authority, implementation of tug escort requirements in 1975,[7] and more recently in the form of Washington's Best Achievable Protection Regulations (hereinafter "BAP safety regulations"). These safety regulations apply to oil tankers travelling through unique and highly treacherous state waters such as the Strait of Juan de Fuca and Puget Sound.

The state of Washington enacted the BAP safety regulations to protect its fisheries, seafood, and coastal communities from catastrophic oil spills. This action represents a valid exercise of state police powers. The U.S. Constitution gives all states broad authority to regulate matters affecting their citizenry's welfare and safety, including ensuring that hazardous substances do not contaminate state waters and food sources. Congress has long recognized the states' integral role in management of activities affecting state natural resources and public safety, and therefore has sought to preserve and expand the traditional role of the state in establishing regulations protecting state natural resources and activities that might affect them.

Washington's BAP safety regulations do not contradict federal regulations, nor do they unduly burden interstate or foreign commerce. Indeed, state safety regulations, such as Washington's, provide an effective means of preventing oil pollution, "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent." *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 328-29 (1973).

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7. Washington was the first state to implement these requirements.

Comparing the nominal economic burden safety standards such as the BAP safety regulations might place on the oil tanker industry to the substantial risks a major oil spill presents to state natural resources and the livelihood of working class family fishermen, local tribes, and coastal communities, the need to enact protective safety regulations aimed at preventing catastrophic oil spills is plain. Conservative estimates show the cost of yearly compliance with these regulations for tankers would be *billions of dollars less* than the potential cleanup costs to the tanker industry for a single major oil spill, even without considering the additional damage costs to the fishing communities and others directly affected by such a disaster. Washington's BAP safety regulations target human error, by far the single largest contributing cause to catastrophic oil spills, and thus will help to avert these grave yet needless accidents in the future. The Court would perform a great service to coastal fishing-dependent communities and the families of commercial fishermen throughout this nation by upholding Washington's BAP safety regulations and allowing states to continue to protect the marine resources upon which many of its citizens depend for their food and livelihood.

ARGUMENT

I. OIL SPILLS PRESENT A SUBSTANTIAL THREAT TO THE HEALTH AND WELFARE OF COASTAL STATES AND THEIR RESOURCES.

A. The *Exxon Valdez*

Shortly after midnight on Good Friday, March 24, 1989, the supertanker *Exxon Valdez* ran aground on the well-marked Bligh Reef in pristine Prince William Sound. The impact ripped open the vessel, and within hours nearly 11 million gallons of crude oil spilled into one of the most productive and diverse marine ecosystems in the world, causing damage that may never be undone. The disaster was due entirely to a combination of

human errors, including a drinking captain leaving an inexperienced third mate at the helm. Had regulations similar to the BAP safety regulations been in place, the catastrophe caused by the *Valdez* spill may have been substantially mitigated or prevented.[8] Years later, despite spending more than $2.5 billion in an effort to remedy the harm caused by the *Valdez* oil spill, the impacts on marine life and local fisheries are still apparent.[9]

The threat of a *Valdez*-like spill occurring in Washington waters is real. Washington's internal waters, the Strait of Juan de Fuca and Puget Sound, are the primary marine conduits for crude oil and refined petroleum products to and from the region. An average of two tankers a day transit Washington waters, the largest carrying as much as 40 million gallons of crude oil — three times the amount spilled by the *Exxon Valdez*.[10] In fact, just one month after the 11-million gallon disaster in Alaska's waters, the tanker *Exxon Philadelphia* lost power close to the shore of Cape Flattery, near the mouth of the Strait of Juan de

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8. The BAP safety regulations were developed with the assistance of the Coast Guard and tanker operators and managers and specifically target human error caused by improper operating procedures and lack of understanding of Washington's treacherous internal waters, *see, e.g.*, Wash. Admin. Code 317-21-200 (watch manning requirements in limited visibility, navigation requirements, pilotage requirements); Wash. Admin. Code 317-21-205 (voyage plans and navigational requirements); Wash. Admin. Code 317-21-230 (personnel training and qualifications); Wash. Admin. Code 317-21-235 (drug and alcohol testing requirements).

9. *See* University of Alaska, Fairbanks, Alaska Sea Grant College Program, Report No. 95-02, *Prevention, Response, and Oversight Five Years After the Exxon Valdez Oil Spill: Proceedings of an International Conference*, 5 (1995).

10. *See* Eric Nalder, *Oil Laden Tanker Safety a Concern as Fleets Merge*, Seattle Times, July 25, 1999.

Fuca.[11] The tanker, carrying 23 million gallons of crude oil, drifted out of control for nearly seven hours.[12] Luckily, tugboats arrived in time to prevent the *Exxon Philadelphia* from becoming another *Exxon Valdez*. And, just this October, the *Angelo D'Amato* and *New Endeavor*, two tankers carrying a combined total of 36 million gallons of fuel and light crude, required the aid of emergency rescue tugs to avoid another *Valdez*-sized spill.

B. Harm to Natural Resources.

The *Exxon Valdez* spill in Alaskan waters provides one of the most recent and powerful examples of both the ecological and economic impacts of an oil spill. Sadly, the kinds of harm caused by the *Valdez* spill are not unique, but rather are typical of the impacts caused by any spill, all of which affect the welfare and livelihood of countless people.

There is a long history of tanker oil spills nationwide. Other spills that have recently polluted the waters in the Pacific Northwest include: a 2.3 million gallon spill off the Olympic coast in 1972; a 239,000 gallon tanker spill off Port Angeles, Washington in 1985; a 231,000 gallon tanker spill along Grays Harbor, Washington in 1988; and a 400,000 gallon spill along the Olympic coast in 1991. Other regions of the country also have been polluted: in 1990, a tanker ran aground in the Kill Van Kull in the New York/New Jersey Harbor, spilling over 250,000 gallons of oil, closing beaches and killing endangered piping plovers; in August of 1993, three ships collided in the main channel leading into the Port of Tampa Bay, spilling 328,000 gallons of oil into the water with an even larger amount catching fire, seriously polluting the air of this highly populated

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11. *See* Puget Sound Water Quality Authority Issue Paper, *Spill Prevention: Means of Preventing Spills of Petroleum and Other Hazardous Substances in Puget Sound* 3 (March 1990).

12. *Id.*

area; in January of 1994, a barge ran aground in Puerto Rican waters after its towing cable broke, and 750,000 gallons of oil spilled into the ocean off a popular beach area; in January of 1996, off the shore of Rhode Island, the *North Cape* barge had to be abandoned after the tug towing it caught fire, and 820,000 gallons of #2 fuel oil were spilled into economically important fisheries; and in March of 1996, a barge in the Houston Ship Channel almost split in two, spilling 714,000 gallons of oil into Galveston Bay. Many similar examples could also be listed.

Large tanker spills like the *Valdez* account for 95% of the total volume of all oil spilled worldwide. Recovery efforts can save only about 8% of oil involved in such a spill, thus leaving the other 92% to evaporate, burn, or settle into the water column and disrupt the fragile marine environment.[13]

Oil spills in marine waters drastically impact fish and wildlife in both the short and long-term. *See Askew*, 411 U.S. at 334-34 & n.5 (citing Note, 10 Harv. Int'l L.J. 316, 321-323 (1969)). Oil smothers birds and other marine life. Experts estimate that over 300,000 birds were killed by the *Valdez* spill.[14] Sea otters also showed immediate physical effects from the *Valdez* oil spill. Their thick insulating fur absorbed oil and impaired natural buoyancy, they ingested oil while attempting to groom and thus suffered lethal internal injuries, and toxic aromatics emitted by the oil suffocated them.[15] The immense impact of the spill on smaller creatures such as amphipods and

13. *See* Mark T. Peterson, Comment, *State Incentive Based Oil Tanker Regulation: An Alternative to Traditional Command-and-Control Regulation*, 4 Ocean and Coastal L.J. 271, 273 (1999).

14. Maurie J. Cohen, Ph.D., Economic Aspects of Technological Accidents: An Evaluation of the Exxon Valdez Oil Spill on South Central Alaska 91 (1993) (published dissertation, University of Pennsylvania).

15. *Id.* at 91-92.

copepods (which form the base of ocean food chains) has caused independent biologists to estimate that recovery of the area affected by the *Valdez* spill will require a minimum of thirty years.[16]

Aside from the immediate physical effects of an oil spill, oil impacts the long-term viability of the marine and coastal ecosystem by chemically breaking down the ecosystem's biologic foundations as it persists in the water column and in the crags or under rocks on-shore. A joint State/Federal Natural Resource Damage Assessment Study conducted from 1989-1991 of the *Exxon Valdez* spill area revealed startling results. The study found a widespread and continuing exposure of many fish species to oil.[17] More surprisingly, the study found evidence of pollock exposure to petroleum one year after the spill at Tugdak Island, more than 400 miles from Bligh Reef. "Pollock, a major fisheries resource in Alaskan waters, are bathypelagic fish which feed in the water column. Thus, these results suggest that the spilled oil affected either the water column or food supply of these fish at great distances from the spill, and for some time after the spill."[18] Today, locals continue to find oil balls on the beaches of Prince William Sound a decade after the *Exxon Valdez* ran aground.

In short, the effects of an oil spill on marine life are devastating and persistent. With many of the nation's fisheries already under severe biological stress, the ecological integrity of the marine environment depends upon avoiding the catastrophic effects of oil pollution by preventing the spills that create it.

16. *Id.* at 93.

17. *See* Exxon Valdez Oil Spill State/Federal Natural Resource Damage Assessment, Final Report, *Assessment of Oil Spill Impacts on Fishery Resources: Measurement of Hydrocarbons and Their Metabolites, and Their Effects, in Important Species* (September 1995).

18. *Id.*

C. Economic Harm to Fisheries Caused by an Oil Spill.

The disastrous impact an oil spill has on natural resources alone justifies the strongest preventative measures. In addition to the ecological effects, however, an oil spill also directly and substantially affects the livelihoods of people dependent on marine resources. The local fishing economy suffers the immediate brunt of an oil spill. And, to the individual and family fisherman, a large spill such as the *Valdez* often means economic ruin.

One of the most severe impacts on fishing families is the immediate closure of fishing grounds. Depending on the magnitude of the spill, these closures may last days, weeks, an entire season, or even years. With fishing profit margins already squeezed tightly, any sudden closure drastically reduces the ability of families dependent on commercial fishing to earn a living. After the *Valdez* oil spill, for example, Alaska closed every fishing area impacted by the spill, resulting in a severely limited commercial salmon fishing season for 1989 and a total cancellation of the 1989 spring herring season throughout several portions of the region. Oil spills also result in decreased market confidence created by a "poisoned fish" mentality: people are unwilling to buy fish from a known polluted area. Consequently, after the *Valdez* spill observers noted that "[o]il was still present in the salmon fishing areas when adult salmon returned in the summer of 1989. Nets could not avoid straining oil and water; oiled nets contaminated the salmon held by them; and oil-contaminated salmon could not be sold."[19]

The effects of any major oil spill on the local fishing economy are devastating. For instance, following the *Valdez* spill the town of Cordova, Alaska (population 2,500), went from being the nation's 7th most lucrative port for commercial fish

19. Wells, Butler & Hughs, *Exxon Valdez Oil Spill: Fate and Effects in Alaskan Waters* 16 (ASTM 1995).

harvest to the 51st in 1993. Cordova's fishing revenue was cut nearly in half after the disaster, reduced from $46 million in 1988 to $26 million in 1997.[20] For some fishermen, the value of salmon fishing permits dropped $250,000 per permit, and subsequent bankruptcy filings by local family fishermen became commonplace. Because of the oil spill the livelihood of the working class fishing family in Cordova was devastated.

The coastal communities of Alaska, like Cordova, are typical of the coastal fishing-dependent communities where *Amici*'s members reside. These communities depend on commercial fishing and fish processing for a large portion of local jobs and economic well being.

Any widespread fishery closure or poison panic caused by an oil spill would negatively and substantially impacts a region's fishing revenue. Following the *Valdez* disaster, Alaska lost an estimated $11 to $45 million in fishing revenue region-wide in a single year.[21] Similar economic impacts on Washington communities would occur should a tanker oil spill occur in the Strait of Juan de Fuca or within Puget Sound.[22] The Washington commercial fisheries generate more than $354 million in annual revenue. Any major oil spill would devastate the region's vibrant coastal economy.

20. *See* Ross Anderson, *10 Years Later, Debate Still Rages Over Effects of Exxon Valdez Oil Spill*, Seattle Times, March 21, 1999.

21. *See* Cohen, *supra* note 14 at v.

22. *See generally* Department of Interior, OCS Study, MMS 88-0084 & 88-0086, *Baseline Socioeconomic Profiles of Coastal Counties in the Washington-Oregon Planning Area* (1988); MMS 91-0056, *Potential Effects of OCS Oil and Gas Exploration and Development on Pacific Northwest Indian Tribes: Final Technical Report* (1991).

D. The Rich and Bountiful Marine Waters of Washington Are Particularly Vulnerable to the Catastrophic Effects of an Oil Spill.

The internal waters of Puget Sound and the Strait of Juan de Fuca harbor some of the world's richest and most diverse marine ecosystems.[23] They attract millions of tourists annually, and are home to, or are visited by, many threatened or endangered species of marine mammals and birds—including several species of salmon, Northern sea lions, humpback whales, and marbled murrelets.[24] The North Puget Sound area also contains a national park, a national marine sanctuary, a national wildlife maritime refuge, and extensive Tribal lands and treaty fishing areas.

Washington's internal waters of Puget Sound and the Strait of Juan de Fuca are particularly susceptible to harm caused by an oil spill. The area is dotted with many small and large islands. There are many long inlets and ship passages can be very narrow. The water exchange through Puget Sound is limited. Because of the narrow straits, miles of low and rocky shoreline, and relatively confined waters that oil tankers must traverse in Washington, the risk of such a spill is increased and the adverse effects of a major spill on the marine environment would be substantially magnified.

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23. *See* 59 Fed. Reg. 24386 (1994); 54 Fed. Reg. 41481 (1989).

24. Other marine wildlife species in this area are protected under the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703, *et seq.*, and the Pacific Salmon Treaty.

II. WASHINGTON POSSESSES THE INHERENT AUTHORITY TO PROTECT ITS WATERS, MARINE LIFE, AND ENVIRONMENT FROM AN OIL SPILL.

A. The Court Has Historically Upheld State Authority to Regulate to Protect and Manage its Marine Environment and to Assure the Safety of its Marine Food Supply.

States have a unique responsibility to citizens to protect their natural resources. Additionally, marine ecosystems produce seafood for human consumption, and states have traditionally had very broad authority to protect and assure the safety of their food supplies.

States are intimately familiar with their local marine resources and the needs of the communities that depend on them. Thus, the state is the regulatory authority that should, and usually does, take the lead in protecting and preserving such resources. With this in mind, however, the federal government shares concurrent authority with states to regulate over matters in admiralty and affecting commercial fishing. The federal authority, if lawfully enacted and within the scope of federal authority, is supreme to state law. Nevertheless, despite the federal government's concurrent authority and the supremacy of federal law, the Court has consistently upheld the inherent authority of states to establish environmental protections to preserve their marine resources and protect the health and safety of their citizens. *See Askew*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). For example, the Court has upheld state laws pertaining to the regulation of fishing and fishing vessels in navigable waters,[25]

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25. *See Skiriotes v. Florida*, 313 U.S. 69 (1941); *Boyside Fish Co. v. Gentry*, 297 U.S. 422 (1936); *Manchester v. Massachusetts*, 139 U.S. 240 (1890).

construction and maintenance of bridges across navigable waterways, opening and closing of draws, the speed of vessels passing through draws,[26] pilotage requirements,[27] enforcement of contracts and attachments even when interrupting interstate commercial voyages,[28] navigation of vessels within state waters,[29] inspections and quarantine of cargoes and passengers,[30] food safety protections,[31] and has even approved state imposed safety equipment requirements on vessels travelling through state waters.[32] These state acts were upheld because no federal law was directly antagonistic to the state action. It is only at that point, the point of direct antagonism, that state authority over its resources and marine environment yields to federal preemption. Short of such a direct conflict, the state regulation should be upheld.

B. Washington Possesses the Inherent Authority to Impose Regulations Aimed at Preventing Catastrophic Oil Spills.

The principal limitation placed on a state's exercise of its police powers is the U.S. Constitution and our system of federalism. State police powers are exceedingly broad. Courts

26. *See Escanaba Co. v. Chicago*, 107 U.S. 678 (1883).

27. *See Olsen v. Smith*, 195 U.S. 332 (1904); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

28. *See The Winnebago*, 205 U.S. 354 (1907).

29. *See Clyde Mallory Lines v. State of Alabama ex rel. State Docks Commission*, 296 U.S. 261 (1935); *The James Gray*, 62 U.S. (21 How.) 184 (1858).

30. *See Morgan's L & T.R. & S.S. Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886).

31. *See Adams v. City of Milwaukee*, 228 U.S. 572, 582-84 (1913).

32. *See Fitch v. Livingston*, 6 N.Y. Sup. Ct. (4 Sandford) 493 (1851) (upholding state law requiring two lights illuminated at night where Congress required "one or more"), *cited with approval in*, *Conway v. Taylor's Executor*, 66 U.S. 603, 621 (1861).

start with the assumption that these historic powers are not superseded unless there is a "clear and manifest purpose of Congress." *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985) (*quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Such intent is not "implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State." *Huron*, 362 U.S. at 443. Such a conflict does not exist in this instance.

A state's interest in protecting its natural resources against pollution falls squarely within its police powers. *See Askew*; *Huron*. Congress recognizes that oil spills are a "real and continuing threat to the public health and welfare of the environment." Marva Jo Wyatt, *Navigating the Limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. Mar. L.J 1, 1n.1 (*quoting* S. Rep. No. 94, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 723). In the exercise of their inherent power, state and local governments "may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." *Huron*, 362 U.S. at 439. Indeed, great deference is given to state legislation that concerns the safety and welfare of citizens.[33]

The Court even permits the states, in the exercise of their police powers, to exert some extraterritorial effect, as long as such effect is incidental and does not disrupt the uniformity of federal law where uniformity is necessary. *See Huron*, 362 U.S. at 444.[34] For example, in *Glenovich v. Noerenberg*, 346 F. Supp. 1286 (D. Alaska), *aff'd*, 409 U.S. 1070 (1972), the Court upheld an Alaska statute that prohibited the use of a drum or reel in operation of purse seiners and thus required vessels fishing in

33. *See* 1 R. Rotunda, J. Nowak & J. Young, *Constitutional Law* § 12.3, at 631 n.8 (1986).

34. Arguably, the Court held in *Askew* that uniformity is not required in the pollution context of this case.

state waters to refit their vessels with power blocks. The requirement to refit fishing vessels, which admittedly had an extraterritorial effect, was upheld because the equipment requirement posed only a slight and incidental burden on interstate commerce. *Id.* Similarly, in *Clyde Mallory Lines v. State of Alabama ex rel. State Docks commission*, 296 U.S. 261 (1935), the Court held that state regulation of harbor traffic was held to be a valid exercise of state police powers although it incidentally affected interstate and foreign commerce.[35]

With regard to oil tanker regulation in particular, the Ninth Circuit Court of Appeals and the First Circuit Court of Appeals have held that a state may validly develop its own oil pollution control and prevention regulation without disrupting the uniformity of federal law. The First Circuit Court of Appeals considered the matter in *Ballard Shipping Co. v. Beach Shellfish*,[36] and found that the Oil Pollution Act of 1990 ("OPA")[37] presents compelling evidence that "Congress does not view either expansion of liability . . . or enactment of comparable state oil pollution regimes as an excessive burden on maritime commerce." *Ballard Shipping*, 32 F.3d at 631.

Indeed, Congress has looked at the states' role in preventing oil pollution, and decided to permit states to continue to enact their own oil spill prevention measures. Comments on the Senate floor in the debate preceding passage of OPA could not be clearer on this point:

> Each state can continue to provide further protection . . . by imposing higher standards of care in the handling and shipping of oil.

35. *See also Claim of Cassaretakis*, 44 N.E.2d 391 (N.Y.), *aff'd*, 319 U.S. 306 (1942) (holding that in the maritime field, as in the field of interstate commerce generally, a state has power to act in matters of merely local concern that do not require uniform national legislation).

36. 32 F.3d 623 (1st Cir. 1994).

37. 33 U.S.C. §§ 2701-2761.

> — Sen. Baucus, Cong. Rec., Oil Pollution Act of 1990, Aug. 2, 1990, at S 11537.
>
> It [OPA] also preserves the rights of individual states to enact even tougher spill response and prevention measures.
>
> — Sen. Levin, Cong. Rec., Oil Pollution Act of 1990, Aug. 2, 1990, at S 11546.

Consequently, when Congress considered the preemption issue in OPA, it kept intact the "long-standing policy in environmental laws of not preempting state authority and recognizing the rights of states to determine for themselves the best way in which to protect their citizens." S. Rep. No. 101-94, 101st Cong., 1st Sess., at 17-18 (1989), *reprinted in* 1990 U.S.C.C.A.N. at 739-40.

C. Fisheries Regulation Is Illustrative of Congress's Recognition of the States' Integral Role in Protection of their Natural Resources.

The regulation of fisheries in America provides one of the best examples of a regime where federal and state governments not only share regulatory authority, but where Congress recognizes the need for state authority in protecting local resources. Congress has even recently expanded such state authority.

Until 1976, with the passage of the Magnuson Act,[38] fishery management was a matter largely left to state regulation. Prior to 1976, the federal government, although claiming control over fisheries up to twelve nautical miles from its coast in 1966,[39]

38. Pub. L. No. 94-265, 90 Stat. 331 (as amended at 16 U.S.C. §§ 1801-1882) (prior to 1980, this Act was known as the Fishery Conservation and Management Act).

39. *See* Eldon V.C. Greenberg & Michael E. Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform*, 55 S. Cal. L. Rev. 641, 648-649 (1982) (citing Bartlett Act, Pub. L. No. 89-658, 80 Stat. 908 (1966) (repealed 1977)).

and possessing broad powers to regulate commercial fisheries under the U.S. Constitution,[40] nevertheless limited its role to that of a silent partner.[41] This absence of federal action meant that the states, acting under their police powers, "were the only governmental units with comprehensive fishery management programs" covering any waters, including offshore waters, and state regulation often extended beyond the state's territorial three-mile limit.[42] Recognizing the benefits of state authority in matters of local concern, the Alaska Supreme Court observed that "the continued abstention from federal regulation of fishing in territorial waters, despite constitutional power to do so, confirms the wisdom of the traditional approach of local, non-uniform management of fisheries resources." *State v. Bundrant*, 546 P.2d 530, 539 (Alaska 1976).

With the passage of the Magnuson Act, Congress altered the traditional balance of fishery management, basing such management on a much-increased federal presence and delineation of the boundary between state and federal waters. However, the Magnuson Act preserved a place for state regulation of fisheries by including a savings clause and

40. *See, e.g.*, U.S. Const. art. I, § 8, cl. 3 (commerce power); U.S. Const. art. II, § 2, cl. 2. (treaty power).

41. *See* Greenberg & Shapiro, *supra* note 39, at 641-642; Arthur J. Tassi, *Fishery Conservation and Management Act of 1976: An Accommodation of State, Federal, and International Interests*, 10 Case W. Res. J. Int'l. L. 703, 705 n.5 (1978) ("Until enactment of the FCMA in 1976, the Federal Government did no more than act as a passive partner or custodian of the [nine-mile] contiguous zone beyond the state's territorial three-mile limit.").

42. *See* Tassi, *supra* note 41, at 704 n.5; Greenberg & Shapiro, *supra* note 39, at 649; *see also State v. Bundrant*, 546 P.2d 530, 539 (Alaska 1976) (upholding state prosecution of crabbing regulations even though defendants were not citizens of the state or arrested within state waters); *Glenovich v. Noerenberg*, 346 F. Supp. 1286 (D. Alaska), *aff'd*, 409 U.S. 1070 (1972).

recognizing a state's right to regulate beyond state boundaries those vessels licensed under its laws. Thus, even though states held less control over fisheries than prior to passage of the Magnuson Act, Courts still recognized the integral role of states in protecting local resources, and routinely upheld state regulations. In many cases, states could regulate fisheries in the exclusive economic zone (hereinafter "EEZ") where no federal regulations covering the fishery existed, or where state law did not actually conflict with an existing federal management plan or did not frustrate the intent of federal management.[43]

Most recently, states have gained increased authority over fisheries management. Congress reconsidered the shared state-federal fishing authority in the 1996 Amendments to the Magnuson Act, and expanded state authority to regulate fishing within the EEZ.[44] The amendments preserved existing state authority over vessels registered under state laws and gave states the power to regulate *any* vessel outside of state boundaries when the management plan for the fishery in which the vessel was operating delegated responsibility to the state, and the state's regulations are not inconsistent with the plan.[45] State regulations may be more stringent than existing federal regulations. Indeed, in the debate over those amendments, when asked whether state regulators were permitted to impose requirements more stringent than federal regulations, Senator Stevens (the bill's author)

43. *See, e.g., State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984) (allowing state regulation of king crab harvesting in the EEZ where no federal plan had been promulgated); *People v. Weeren*, 607 P.2d 1279 (Cal. 1980) (upholding state penal jurisdiction over defendant who used a state-licensed vessel to take swordfish in EEZ in violation of state regulations and no federal regulatory plan for swordfish had been implemented).

44. *See* 16 U.S.C. § 1856(a)(3).

45. *See* 16 U.S.C. § 1856(a)(3)(B).

replied with a resounding yes, so long as the state regulations were not antagonistic to the intent of federal management.[46]

Congress recently re-emphasized the important role of state management in fisheries by passing legislation concerning the Atlantic coast fishery. Prior to passage of the Atlantic Coast Fisheries Cooperative Management Act (hereinafter "ACFCMA")[47] in 1993, disjointed management had led to poor regulation of fisheries in the Atlantic coast region.[48] Upon considering the matter, Congress found that responsibility for management of Atlantic coast fisheries should lie with the states,[49] and provided, among other things, for state authority to enact complementary fishing regulations in federal waters.[50]

Consequently, under both the Magnuson Act Amendments and ACFCMA, Congress articulated its intended purpose of increasing state authority beyond state boundaries over an activity integrally affecting state resources. Congress has recognized the states' unique responsibility and perspective in designing the best methods for protecting their resources.

D. Congress Not Only Recognizes the States' Integral Role in Protecting their Natural Resources, but Has Also Expanded that Authority.

Regulating oil tankers travelling through internal waters in order to protect state marine resources and assure food safety is in many ways no different than state fisheries regulation.

46. *See* 142 Cong. Rec. S 10,911 (1996) (Statement of Sen. Stevens)); *see also* 16 U.S.C. § 1856(a)(3)(B).

47. 16 U.S.C. §§ 5101-5108.

48. *See* Erik T. Barstow, Comment, *American Lobster Fishery Management under the Atlantic Coastal Fisheries Cooperative Management Act: an Attempt at Cooperative Fishery Jurisdiction*, 4 Ocean and Coastal L.J. 113, 124 (1999).

49. *See* 16 U.S.C. § 5101(a)(4).

50. *See* 16 U.S.C. § 5103(b).

Congress has in fact expressly reserved a place for state action.[51] Congress has also recognized the right of states to impose more stringent, protective standards.[52] Similarly, Congress's understanding of the states' paramount interest in protecting their own natural resources — whether from degradation by pollution or through poor fishing practices — underlies the preservation of state authority in this case.

It stands to reason that protection of precious state coastal and marine natural resources would include state involvement in the regulation of activities affecting its resources. Indeed, Congress has enacted additional legislation affirming a state's responsibility to regulate and protect its own coastal resources, including the Submerged Lands Act[53] and the Coastal Zone Management Act ("CZMA").[54] In the Submerged Lands Act, Congress expressly provides States with concurrent authority to regulate activities within their navigable waters. The authority presumably includes regulation of vessel traffic and extends that authority to "that portion of the Continental Shelf which would be within the boundaries of such State if extended seaward to the outer margin of the shelf." H. Rep. No. 215, 83rd Cong., 1st Sess. 2 (1953), *reprinted in* 1953 U.S.C.C.A.N. 1385, 1406; *see United States v. California*, 436 U.S. 32, 39 (1978). To give states an added incentive to participate in the coastal zone management program, CZMA also stipulates that federal activities within respective coastal management zone boundaries be, to the maximum extent feasible, consistent with approved state CZM programs.[55] This provision is a kind of

51. *See* 33 U.S.C. § 2178(a), (c).

52. *See supra* (Statements of Senators Baucus and Levin).

53. 43 U.S.C. §§ 1311, *et seq.*

54. 16 U.S.C. §§ 1451, *et seq.*

55. *See* 16 U.S.C. § 1456. Washington's Shoreline Management Act, RCW 90.58, was the first state legislation under CZMA to receive federal approval.

reverse preemption that assures states that actions by the federal government will be consistent with the state's plan. Indeed, for nearly every federal Act affecting coastal protection, tidelands, waters, and resources, Congress has included a provision for shared state management. Thus, as with fishery regulation, any effort made by a state to protect its environment and marine resources from catastrophic oil spills should be presumed to be a valid exercise of state police powers unless and until the federal government expressly preempts the field or institutes a specific regulation that actually conflicts with state law.

III. PUBLIC POLICY SUPPORTS THE PRESERVATION OF STATE AUTHORITY IN PROTECTING THE LOCAL MARINE ENVIRONMENT AND COASTAL COMMUNITIES FROM THE RISK OF CATASTROPHIC OIL SPILLS.

A. The Economic Burden of Washington's BAP Safety Regulations on the Tanker Industry Is *De Minimis* when Compared to the Economic Costs of a Major Oil Spill.

Intertanko asserts that the cost of complying with Washington's BAP regulations imposes an undue burden on interstate or foreign commerce. The record before the District Court belies Intertanko's assertions. The cost of compliance represents at most 1.0 - 2.4% of the total yearly operating budget for its tankers:

> [T]he average annual costs for the larger tankers importing oil into Puget Sound (which are most likely to represent the bulk of vessels) range between $13.6 million and $19 million for U.S. tankers (which are the majority of tankers calling at Puget Sound) and between $8.4 million and $12 million for non-U.S. flag tankers. Thus, even if the cost of the BAP rules were double Intertanko's claim . . . these costs would constitute between 1% and 2.4% of the tanker's annual total operating *costs*. Since in fact many of the BAP compliance costs would not be repeated each year (such as the $80,000 installation of the tow package), the actual impact would be far less – probably less than one percent.[56]

Intertanko also gives short shrift to the huge costs of cleanup after any major oil spill (in the billions for the *Exxon Valdez*) — costs falling not just on the oil industry but also on the shoulders of many other individuals.

In this brief, *Amici* have described some of the costs to the fishing industry caused by just one recent major oil spill. Commercial fishermen are but one of many sectors economically damaged by any major oil spill. Tourism, recreational fishing, acquaculture and many other interests also are affected greatly. As the *Exxon Valdez* spill demonstrates, some of the ecological damage may take decades to heal. The potentially huge economic and ecological damage caused by major oil spills, plus the increased risks of a similar incident occurring in the near future as a result of more and more vessel traffic plying treacherous waters, illustrate the substantial need for allowing the sort of preventative measures taken by the State of Washington.

Aside from the staggering cost of a spill to fishing communities and local businesses, the costs of an oil spill to the tanker industry itself cannot be overlooked. Such costs include response costs incurred immediately after an accident. As one poignant example, Exxon spent an estimated $20 million in an effort to save 350 sea otters damaged by the *Valdez* oil spill.[57] Of the 350, only 220 survived at an estimated cost of

56. Affidavit of Arthur McKenzie, at 4 (September 27, 1996).

57. *See* Cohen, *supra* note 14, at 92.

$89,000 apiece.[58] Yet the $20 million spent by Exxon to treat sea otters after the accident was one of the smallest response costs borne by the industry — costs which totaled nearly $2 billion.[59] Adding the $2 billion in response costs to the $900 million state settlement and the $5.3 billion jury award against Exxon for the *Valdez* spill begs the question why the oil tanker industry refuses to comply with the strictest prevention and safety standards in order to prevent a similar spill. With companies like Exxon boasting amazing profits — $137 billion in sales and $8.5 billion in profits in 1997[60] — the fact that these companies shy away from paying just a little bit more in operating costs to greatly increase tanker safety is remarkable.

Apparently, however, Intertanko's members would rather gamble that they will always be able to avoid a similar catastrophic oil spill in the future. The long history of oil spills certainly suggests otherwise. Washingtonians, commercial fishermen, coastal communities, Native Americans, and others who depend on the marine food resources that are most vulnerable to oil spill damage disagree with Intertanko's policy of playing "Russian Roulette" with their personal safety and their livelihood. So should the Court.

B. Washington's BAP Safety Regulations Will Likely Succeed in Reducing the Risk of Catastrophic Oil Spills in State Waters.

The *Exxon Valdez* spilled more oil than any other single tanker accident in U.S. history. Yet, the catastrophe caused by the *Exxon Valdez* is certainly not an isolated incident, as indicated above. When the Washington Legislature took a hard look at what could be causing so many devastating accidents in

58. *Id.*

59. *See* Ross Anderson, *Appeal of $5 Billion Fine Reopens Valdez Battle*, Seattle Times, May 2, 1999.

60. *Id.*

local waters, it found human error to blame in almost every case. Moreover, concerns about human error are magnified when considering the treacherous conditions of Washington's local waters. Washington is well known for seasonal heavy fog and inclement weather with significant traffic congestion at the mouth of the Strait of Juan de Fuca, compounded by traffic from commercial and recreational fishing vessels and ferry passengers.[61]

Washington's BAP safety regulations directly address the major areas of human error associated with tanker accidents: training, operation, personnel, and management policies. The BAP safety requirements specifically target human activities on board oil tankers and seek to prevent accidents caused by human error. The Washington Legislature adopted the BAP safety regulations with considerable evidence before it, compiled by the Coast Guard and others that participated in the drafting of the regulations, that these regulations would likely be effective in addressing the problems of human error. Thus, the BAP safety regulations only serve to further, rather than frustrate, the objectives of Congress promoted by OPA.

CONCLUSION

Through enactment of the BAP safety regulations, Washington is continuing in the tradition of regulating for the benefit of its citizens and local communities. These regulations will help to reduce the risk of and prevent catastrophic oil spills caused by tankers traveling through Washington's internal waters. They seek to preserve the state's fragile marine ecosystem, prevent economic devastation to the state's important commercial fishing industry, protect the safety of seafood consumers, and protect the livelihood of local coastal communities. Like the tug regulations that the Court upheld in

61. *See* United States Coast Guard Volpe Transp. Center Study (1997).

Ray, Washington's BAP safety regulations are also needed because of the "peculiarities in the local waters that call for special precautionary measures."[62]

All things considered, it is far easier for the oil tanker industry to absorb the minimal costs of oil spill prevention than it is for the environment and the fragile marine ecosystems to absorb spilled oil. *Amici* respectfully request that the Court uphold Washington's efforts to protect its environment, fishing economy, seafood, and people from this "insidious form of pollution." *Askew*, 411 U.S. at 329.

Respectfully submitted,

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62. *Ray v. Atlantic Richfield*, 435 U.S. 151, 171 (1978).

APPENDIX

APPENDIX — PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS MEMBERS

Commercial Fishermen of Santa Barbara, Inc.

Commercial Fishermen's Organization of Morro Bay

Crab Boat Owners' Association

Del Norte Fishermen's Marketing Association

Fishermen's Marketing Association of Bodega Bay

Salmon Trollers' Marketing Association

Half Moon Bay Fishermen's Marketing Association

Humboldt Fishermen's Marketing Association

Moss Landing Commercial Fishermen's Association

Port San Luis Commercial Fishermen's Association

Santa Cruz Fishermen's Marketing Association

Golden State Trollers Association

Small Boat Commercial Salmon Fishermen's Association

Trinidad Bay Fishermen's Marketing Association

Southern California Trawlers Association

Golden Gate Fishermen's Association

Appendix A

Salmon for All

Federation of Independent Seafood Harvesters (FISH)

United Fishermen of Alaska

Ventura Commercial Fishermen's Association

Central California Longline Association

Washington Trollers Association

Western Fishboat Owners' Association

Monterey Fishermen's Marketing Association

Shelter Cove Commercial Fishermen's Association